Supreme Court, U.S.
FILED

No. 06-

06-795 DEC 6 - 2006

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In The

Supreme Court of the United States

KAY STONE,

Petitioner,

v.

THE HEALTH CARE AUTHORITY OF THE CITY OF HUNTSVILLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

HENRY F. SHERROD III
HENRY F. SHERROD III, P.C.
119 South Court Street
Florence, Alabama 35630
Phone: (256) 764-4141
Fax: (877) 684-0802

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May an employer avoid liability under the federal anti-discrimination laws for an employment decision that is the result of actions by a supervisor motivated by discrimination or retaliation by showing that a different official was the ultimate decisionmaker?

PARTIES

The parties to this action are set forth in the caption.

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OPINIONS BELOW

The September 7, 2006 opinion of the court of appeals, which is not officially reported, is set forth at pages 1a-3a of the Appendix. The March 28, 2006 memorandum opinion of the district court, which is not officially reported, is set forth at pages 4a-24a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The employment anti-discrimination provision in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a), provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The anti-retaliation provision in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12203(a), provides:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified,

> assi[illegible] or participated in any manner in an investi[illegible]on, proceeding, or hearing under this chapter.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides in pertinent part regarding discrimination and retaliation in employment:

> (a) No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .
>
> . . .
>
> (d) The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

STATEMENT OF THE CASE

This is a disability discrimination and retaliation case under the ADA and the Rehabilitation Act by Kay Stone against the Healthcare Authority of the City of Huntsville, Alabama, which operates Huntsville Hospital. Plaintiff alleges her dismissal by the hospital's Vice President for

Human Resources was orchestrated by plaintiff's immediate supervisor for discriminatory and retaliatory reasons. Plaintiff alleges the supervisor made a co-worker write a statement falsely accusing plaintiff of threatening to kill the supervisor. Plaintiff also alleges the supervisor ordered the co-worker to make the charge "stick" when she met with the Vice President. (Deposition of Amy Ashby at 156).

Plaintiff had actually made no threat to harm her supervisor. Upset after a counseling session with the supervisor, plaintiff told her mother after work that the supervisor had made her "so upset [she] felt like choking [the supervisor's] neck" or similar words to the same effect. (App. 11a). At lunch the next day she told the co-worker how she had felt the prior afternoon. (App. 11a). The co-worker told the supervisor. (App. 12a).[1] The supervisor made a report to her manager and to someone in the human resources department, who instructed her to have the co-worker document her conversation with plaintiff. (App. 11a).

The supervisor made the co-worker add false allegations to her written statement (Plaintiff's Exhibit 5) that transformed plaintiff's use of a common figure of speech into a present intent to kill. The supervisor's additions to the co-worker's statement included (1) that "[the plaintiff] wanted to wrap her hands around [the supervisor's] neck

[1] The district court states that the co-worker went to the supervisor out of concern for the supervisor's safety. (App. 11a). There is a dispute in the record on this point, however, as the co-worker also testified that she did not bring the comment by plaintiff to the supervisor's attention; rather, while laughing in a phone conversation initiated by the supervisor, the co-worker asked, "as a joking remark," what she had done to make the plaintiff so upset. (Deposition of Amy Ashby at 28-29, 105).

and strangle the life out of her before she clocked out yesterday," (Deposition of Amy Ashby at 34-36); (2) that plaintiff "stated she was serious" about harming the supervisor, (Deposition of Amy Ashby at 37); and (3) that plaintiff was "so furious and serious about doing harm that [the co-worker] felt it should be brought to [the supervisor's] attention," (Deposition of Amy Ashby at 37-38).

The district court dismissed the case on the hospital's motion for summary judgment.[2] The district court acknowledged a factual dispute regarding the supervisor's influence on the written statement the co-worker submitted but concluded the case could be decided without considering the statement's effect upon the Vice President's decision. (App. 11a n.4). The court resolved the case based on the reasonableness of the Vice President's actions on the day of plaintiff's termination. (App. 15a-16a). The Eleventh Circuit affirmed, stating in pertinent part that the record showed plaintiff was terminated for a threat against her supervisor. (App. 2a).

Neither the district court nor the court of appeals questioned that plaintiff had raised factual issues for trial regarding the supervisor's influence on the co-worker's written statement, the supervisor's influence on what the co-worker said to the Vice President, and the supervisor's

[2] This was the second motion for summary judgment granted by the court. The district court granted a prior motion, but the court of appeals reversed and remanded because the district court did not make findings of fact and conclusions of law. (App. 1a-2a).

having discriminatory and retaliatory motivations.[3] Neither opinion addressed these factual issues.

The opinions below instead focused on the reasonable perception of the Vice President that plaintiff threatened to kill the supervisor. Here, the Vice President conducted an investigation of the allegation, including interviewing the co-worker and interviewing plaintiff, and reasonably concluded, based on the information she had, that plaintiff threatened to kill her supervisor. (App. 11a-12a, 15a-16a).

The decisions of the district court and court of appeals are premised on the Vice President's acting in good faith and reasonably under the circumstances. Of course, barring a change of heart by either the supervisor or the co-worker, no investigation by the Vice President could have uncovered the falsity of the threat allegation. Thus, this case presents the question whether an employer may avoid liability for an employment decision that is the result of actions by a supervisor motivated by discrimination or retaliation by showing that a different official was the ultimate decisionmaker.

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[3] The supervisor told the co-worker she had been wanting to get rid of plaintiff for a long time. (Deposition of Amy Ashby at 86, 89).

REASON FOR GRANTING THE WRIT

THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING WHETHER FEDERAL ANTI-DISCRIMINATION LAWS APPLY TO AN ACTION BY AN EMPLOYER THAT IS INFLUENCED OR CAUSED BY A SUPERVISOR WITH DISCRIMINATORY OR RETALIATORY MOTIVATION

There is an inter-circuit conflict regarding the application of federal anti-discrimination laws to employment decisions that result from the actions of a discriminatory or retaliatory supervisor but for which the supervisor was not officially responsible because of the involvement of another official, typically a person higher in the supervisory chain of command. In fact, currently pending before the Court are two petitions for certiorari that explain the conflict and the issue's importance and ask this Court to resolve the issue.

One petition is out of the Fourth Circuit, *Sawicki Petition*, No. 06-306, 2006 WL 2546436 (August 30, 2006), and the other is out of the Tenth Circuit, *BCI Coca-Cola Bottling Co. of Los Angeles Petition*, No. 06-341, 2006 WL 2582502 (September 5, 2006). These petitions will likely be ruled on prior to consideration of this petition. If one or both of these petitions is granted, petitioner requests that the Court hold her case pending the merits review and vacate and remand for reconsideration in light of the Court's ruling.

The Fourth Circuit has taken the most restrictive approach to resolving the employer liability issue presented. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005). In the Fourth Circuit, an employer is

only responsible for the actions of the official decisionmaker, "the one principally responsible for the decision or the actual decisionmaker for the employer;" the employer is not liable even if a subordinate supervisor "had a substantial influence on the ultimate decision or ... played a role, even a significant one, in the adverse employment decision." *Id.* Proof that a company official, acting for a discriminatory or retaliatory purpose, brought about the dismissal of an employee is insufficient to establish a violation of federal law in the Fourth Circuit unless that official made "the final or formal employment decision." *Id.*

The en banc majority in *Hill* acknowledged that its decision established an employer liability standard contrary to the one in other circuits but claimed the decisions in those circuits lacked an adequate "discussion of agency principles" and had "not always described the theory in consistent ways." *Id.* at 289-90. The dissenting opinion in *Hill* emphasized that the standard adopted by the majority was in conflict with decisions in numerous other circuits, which "have held that when the discriminatory bias of a subordinate influences an employment decision, the employer will be charged with the subordinate's bias." *Id.* at 302.

The Eleventh Circuit has taken an approach similar to the Fourth Circuit's. Though earlier Eleventh Circuit decisions appeared to recognize that influence was the touchstone for employer liability, *see Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1565 (11th Cir. 1987); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1526 (11th Cir. 1991), more recent decisions have repeatedly stated that an employer will only be liable for the discriminatory actions of a lower ranking official if the higher

ranking official "rubber stamped" a recommended employment action without examining its merits or otherwise was a mere "conduit" for another's decision. *See McShane v. U.S. Attorney General*, 1[illegible] Fed. Appx. 779, 791 (11th Cir. 2005) ("[A]lthough causation may be established, even when the person with the unlawful animus is not the decision-maker, the actual decision-maker must have acted in accordance with this person's decision, without the actual decision-maker himself evaluating the employee's situation."); *Wascura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001) ("Therefore, even if the Commissioners did in fact merely 'rubber-stamp' the Mayor's recommendation that Wascura be terminated, this alone is insufficient to show pretext for discrimination. This is not a case in which a plaintiff has created a jury issue with respect to discrimination on the part of a dominant decision-maker whose decision was rubber-stamped by others."); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999) (employer liable if official decisionmaker merely "acted as a . . . rubber stamp for [a third party's] recommendation"), *reh'g denied*, 200 F.3d 818, *cert. denied*, 529 U.S. 1053 (2000); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (employer liable if employee with discriminatory animus is the real decisionmaker because "the titular 'decisionmaker' is a mere conduit"), *reh'g denied*, 178 F.3d 1305, *cert. denied*, 528 U.S. 930 (1999).

While in the Eleventh Circuit the door is theoretically open to employer liability for some employment actions caused by non-decisionmakers, it is apparent that the door is not open wide enough for many victims of discrimination to get through. Only rarely will an employee be able to meet the rubber stamp standard.

The rarity of employer liability under the rubber stamp standard in the Eleventh Circuit can readily be seen by its application to Huntsville Hospital. As a practical matter, by having the Vice President for Human Resources review the merits of all significant employment actions, as she did the one here, Huntsville Hospital can effectively insulate itself from liability under the anti-discrimination laws for most, if not all, of its employment decisions, regardless of whether a particular action resulted from a supervisor recommendation motivated by discrimination or retaliation.

The strict approach of the Fourth Circuit has been expressly rejected by two circuits, and these circuits necessarily reject the rubber stamp standard applied in the Eleventh Circuit as well.

Hill was expressly rejected by the Seventh Circuit in *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004). *Hill* rested its decision heavily on the Seventh Circuit decision in *Shager v. Upjohn Co.*, 913 F.2d 398 (1990), because *Shage*r was cited by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762-63 (1998). 354 F.3d at 288. Judge Posner, the author of *Shager*, explained that *Hill* was based on a flawed reading of *Shager* and inconsistent with traditional causation analysis:

> We are mindful that *Hill* . . . holds that a subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor; the supervisor must be the subordinate's "cat's paw" for such imputation to be permitted. That is not the view of this court, even though the "cat's paw" formula apparently originated in our decision in *Shager*. . . .

> The formula was (obviously) not intended to be taken literally (Sealy employs no felines), and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation. If [the higher ranking official] would not have turned down Lust for the promotion had it not been for [the lower ranking official's] recommendation, a recommendation that the jury could reasonably find was motivated by sexist attitudes, then [the lower ranking official's] sexism was a cause of Lust's injury, whether or not [the higher ranking official] could reasonably be thought a mere cat's paw.

Lust, 383 F.3d at 584.

The Seventh Circuit has repeatedly found liability when an employer's decision was influenced by the actions of a lower ranking official who, for discriminatory or retaliatory reasons, provided false information to the actual decisionmaker. *See David v. Caterpillar, Inc.*, 324 F.3d 851, 861 (7th Cir. 2003) ("[W]e have stated that the retaliatory motive of a 'nondecisionmaker' may be imputed to the company where the 'nondecisionmaker' influenced the employment decision by concealing relevant information from, or feeding false information to, the ultimate decisionmaker."); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997) (opinion by Posner, J.) ("[There is] one situation in which the prejudices of an employee, normally a subordinate . . . , are imputed to the employee who has formal authority over the plaintiff's job. That is where the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to influence the decision . . . . In such a case, the discriminatory motive of the other employee, not the autonomous judgment of the nondiscriminating

decision-maker, is the real cause of the adverse employment action."); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997) ("[T]he forbidden motive of a subordinate employee can be imputed to the employer . . . [if] a subordinate, by concealing relevant information from the decisionmaker, is able to manipulate the decisionmaking process and to influence the decision.") (citing *Shager*); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir. 1993) ("An employer cannot escape responsibility for wilful discrimination by multiple layers of paper review, when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of older workers.") (citing *Shager*); *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994) ("Summary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided . . . input that may have affected the adverse employment action."); *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1155 (7th Cir. 1989) (affirming finding of liability because of evidence that the actual decisionmaker "accepted . . . input" from biased official in deciding to fire the plaintiff).

Hill was also expressly rejected by the Tenth Circuit in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006). The Tenth Circuit described the Fourth Circuit's position in *Hill* as "extreme," *id.* at 487, and, following *Lust*, rejected the Fourth Circuit's approach as "inconsistent with the normal analysis of causal issues in tort litigation," *id.* (quoting *Lust*, 383 F.3d at 584).

The Tenth Circuit rejected a claim by the *Hill* court that its approach was supported by this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). *Hill* had relied in part on a passage in *Reeves*

describing a company official in that case as the "actual decisionmaker." *See Hill*, 354 F.3d at 288 (citing *Reeves*, 530 U.S. at 151-53). The Tenth Circuit found that "the Fourth Circuit [made] too much of the phrase 'actual decisionmaker' in *Reeves*" because "the Court was describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability." *BCI*, 450 F.3d at 487. It found "[t]he Fourth Circuit's peculiar focus on 'who is the "decision-maker" for purposes of discrimination actions,' *Hill*, 354 F.3d at 286, . . . misplaced," as "[t]he word 'decisionmaker' appears nowhere in Title VII." *Id.*

The Tenth Circuit in *BCI* also expressly disagreed with the position of the Seventh Circuit and other circuits that employers are liable when a biased subordinate has had "influence," stating that "[s]ome circuits take a lenient approach, formulating the inquiry as whether the subordinate "possessed leverage or exerted influence[ ] over the titular decisionmaker." *Id.* The court reasoned that "[s]uch a weak relationship between the subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation." *Id.* at 486-87. The Tenth Circuit limits employer liability to cases in which "the biased subordinate's discriminatory reports, recommendation, or other actions **caused** the adverse employment action." *Id.* at 487 (emphasis added).

In addition to the Seventh and Tenth Circuits, eight other circuits, the First, Second, Third, Fifth, Sixth, Eighth, Ninth, and District of Columbia Circuits, reject the strict approach of the Fourth and Eleventh Circuits. These circuits authorize employer liability if a biased subordinate exerts influence over or is involved in the decision. *See Sawicki Petition*, No. 06-306 at 20, 2006 WL 2546436 at 14-15 (collecting cases).

Whether a test involving "influence" as the touchstone or a "caused" standard is applied, the actions of plaintiff's supervisor at issue in this case are actions for which Huntsville Hospital may be liable. Only under the restrictive approaches in the Fourth and Eleventh Circuits would plaintiff have no remedy.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter. Alternatively, if the Court grants one or both of the pending petitions for review raising the issue presented here, petitioner requests that this petition be held pending the merits review and that the decision of the court of appeals be vacated and remanded for reconsideration in light of the Court's ruling.

Respectfully submitted,

HENRY F. SHERROD III
HENRY F. SHERROD III, P.C.
119 South Court Street
Florence, Alabama 35630
(256) 764-4141

Attorney for Petitioner

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12206
Non-Argument Calendar

D. C. Docket No. 01-01862-CV-HS-NW

KAY STONE,

Plaintiff-Appellant,

versus

HEALTH CARE AUTHORITY OF THE
CITY OF HUNTSVILLE, THE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(September 7, 2006)

Before ANDERSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

This is the second time we have considered an appeal of this case. In the first appeal, we vacated the district court's order granting summary judgment in favor of the Health Care Authority of the City of Huntsville ("Huntsville Hospital") for failure to make findings of fact and

conclusions of law and remanded the case for further proceedings consistent with our opinion. *See Stone v. The Health Care Authority of the City of Huntsville*, No. 03-10829 (11th Cir. Oct. 10, 2003). On remand, the district court once again granted summary judgment in favor of Huntsville Hospital and complied with our mandate by making detailed findings of fact and conclusions of law.

Appellant Kay Stone ("Stone") commenced this action by filing a complaint alleging separate and individual violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213, as amended, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. We review a district court's grant of summary judgment *de novo*. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1085 (11th Cir. 2004).

After reviewing the record and reading the parties' briefs, we conclude that Stone failed to produce sufficient evidence that Huntsville Hospital discriminated against her because of her disability sufficient to overcome summary judgment. In fact, the record demonstrates that the reason for Stone's termination was her threat made against her supervisor.[1] Moreover, the undisputed record of evidence demonstrates that no reasonable accommodations were denied to Stone and Huntsville Hospital did not retaliate against her.

For the above-stated reasons, we affirm the district court's order granting summary judgment in favor of

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[1] The record also demonstrates that Huntsville Hospital terminated an African-American employee earlier the same week it terminated Stone for making similar threats in the workplace.

Huntsville Hospital on Stone's discrimination, retaliation, and failure to accommodate claims.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

KAY STONE, Plaintiff, v. THE HEALTH CARE AUTHORITY OF THE CITY OF HUNTSVILLE, Defendant.	)	CIVIL ACTION NO. 3:01-CV-01862-VEH

MEMORANDUM OPINION

(Filed Mar. 28, 2006)

This matter is before the Court on Defendant Health Care Authority of the City of Huntsville's (hereinafter "Huntsville Hospital") October 17, 2002, motion for summary judgement as to Plaintiff Kay Stone's (hereinafter "Stone") claims. Stone commenced this action on July 27, 2001, by filing a complaint in this Court alleging separate and individual violations of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, as amended, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 294. [Complaint ¶ 1]. Stone alleges that she is a qualified individual with a disability who suffers from Attention Deficit-Hyperactivity Disorder (hereinafter "ADHD"), depression, post-traumatic stress syndrome, and borderline I.Q. [Complaint ¶¶ 8, 10]. Stone contends that Huntsville Hospital refused to accommodate her disabilities and on or about March 31, 2000 Huntsville Hospital discharged Stone because of her disabilities and/or her requests for accommodation. [Complaint ¶¶ 11-13].

Defendant's motion was initially before the Honorable Judge Lynwood Smith. Judge Smith granted summary judgment in favor of the Defendant and adopted the Defendant's briefs as the opinion of the Court. This decision was appealed and the Eleventh Circuit Court of Appeals vacated and remanded Judge Smith's decision.[1] This matter is now properly before this Court.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. Once the moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions of file, designate specific

[1] The opinion was vacated and remanded on the grounds of Judge Smith's decision to adopt the Defendant's briefs as the opinion of the Court. However, the 11th Circuit Court also noted that genuine issues of material fact may exist which would also preclude the case from summary judgement.

facts showing that there is a genuine issue for trial. *Id.* at 324.

The substantive law will identify which facts are material and which are irrelevant. *Chapman*, 229 F.3d at 1023; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *Chapman*, 229 F.3d at 1023; *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *Chapman*, 229 F.3d at 1023. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249.

The method used by the party moving for summary judgment to discharge its initial burden depends on whether that party bears the burden of proof on the issue at trial. *See Fitzpatrick*, 2 F.3d at 1115-17 (citing *United States v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991) (en banc)). If the moving party bears the burden of proof at trial, then it can only meet its initial burden on summary judgment by coming forward with positive evidence demonstrating the absence of a genuine issue of material fact; i.e. facts that would entitle it to a directed verdict if not controverted at trial. *Fitzpatrick*, 2 F.3d at 1115. Once the moving party makes such a showing, the burden shifts to the non-moving party to produce significant, probative evidence demonstrating a genuine issue for trial.

If the moving party does not bear the burden of proof at trial, it can satisfy its initial burden on summary

judgment in either of two ways. First, the moving party may produce affirmative evidence negating a material fact, thus demonstrating that the non-moving party will be unable to prove its case at trial. Once the moving party satisfies its burden using this method, the non-moving party must respond with positive evidence sufficient to resist a motion for directed verdict at trial. The second method by which the moving party who does not bear the burden of proof at trial can satisfy its initial burden on summary judgment is to *affirmatively* show the absence of evidence in the record to support a judgment for the non-moving party on the issue in question. This method requires more than a simple statement that the non-moving party cannot meet its burden at trial but does not require evidence negating the nonmovant's claim; it simply requires the movant to point out to the district court that there is an absence of evidence to support the non-moving party's case. *Fitzpatrick*, 2 F.3d at 1115-16. If the movant meets its initial burden by using this second method, the non-moving party may either point out to the court record evidence, overlooked or ignored by the movant, sufficient to withstand a directed verdict, or the non-moving party may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. However, when responding, the non-movant can no longer rest on mere allegations, but must set forth evidence of specific facts. *Lewis v. Casey*, 518 U.S. 343, 358 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

FACTS[2]

Stone suffers from type I diabetes and at various times during her life has been diagnosed with attention deficit hyperactivity disorder (ADHD), depression, various personality disorders, post-traumatic stress syndrome (PTSD), bulimia, laxative abuse, trichotillomania (pulling out your own hair), and borderline I.Q. [Complaint ¶ 8; Dr. Sandy Depo. at 42-44, 49-51, 57-58, 63, 108; Dr. Johnson Depo. at 19-22]. As a result of these disabilities, Stone is impaired in the following areas: (1) her ability to communicate; (2) her ability to function socially; (3) her ability to learn new tasks and; (3) her ability to work. [Dr. Sandy Depo. at 95, 145, 187, 210, 232-34, 249-250, 300-301].

Stone was a full-time employee of Huntsville Hospital from 1990 until her termination on March 31, 2000. [K. Stone Depo. at 9-10]. During the early years of her employment Stone's primary job was filing but she was also used to fill in for three mail couriers in the event of a courier's absence. [McGaha Aff. ¶ 3]. There were three mail couriers; two delivered mail on the outside routes of the hospital and the other delivered mail on the inside route. If any of those couriers were absent, Stone was assigned to cover the inside route and the other two couriers were assigned to the outside routes. [K. Stone Depo. at 73-77]. Stone was unable to perform the outside routes because she was prohibited from driving after an automobile accident in 1994; this accident created problems with Stone's ability to obtain coverage under the Hospital's liability insurance policy. [Rosler Depo. at 67-68]. As an

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[2] Where facts are disputed, the Court, as it must, has viewed the facts in the light most favorable to Stone, the non-movant. *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000).

accommodation for Stone's diabetes and inability to drive, other hospital employees would drive her to the post office whenever it was her responsibility to pick up the mail. [Pl. Depo. at 199-202].

By the late 1990's, Huntsville Hospital stopped maintaining hard-copy records of patient admissions and emergency room treatments. [Newby Depo. at 35-36]. These categories were two of the three categories which Stone was responsible for filing. [Henderson Depo. at 181-86]. The elimination of these two categories caused Stone's filing duties to be decreased. [Newby Depo. at 35-36; Henderson Depo. at 181-86].

As a result of this decrease in duties, Stone was reclassified as a "courier/file clerk" and she was used to perform tasks in other areas of the office on a more frequent basis. [Pl. Depo. at 93-94, 125-128; Newby Depo. at 45; Henderson Depo. at 181-86]. However, Stone maintains that her filing work was her essential function and her work as a relief courier was a "secondary" function. [Pl. Ex. 47 at HH0045-HH0047 (1999)]. Huntsville Hospital contends that by the end of 2001, Stone's old job as a file clerk had been totally eliminated. [Henderson Aff. ¶ 15]. There is currently no file clerk or file room in the Patient Accounting Office where Stone previously worked. [Newby Depo. at 44-45].

In late 1999, one of the mail employees who was regularly assigned to cover the inside mail route had to be off work for several months. [Rosler Depo. II at 163-167]. Consequently, Stone was assigned to mail courier duties with increasing frequency. [Rosler Depo. II at 163-167]. During this time period, Stone's anxieties increased, her work performance decreased, and tensions escalated

between Stone and her supervisor, JoAnn McGaha (hereinafter "McGaha"). [X21 to K. Stone Depo.]. Stone contends that her problems completing the mail rounds were not new but rather made issue only toward the end of her employment. [K. Stone Aff. at ¶ 26]. Stone's work related problems resulted in constant oral and written reprimand. [K. Stone Aff. at ¶ 26]. The primary issue surrounding Stone's completion of the mail rounds involved timing. It was important that the mail be delivered in a timely manner to the various departments within the hospital because sometimes the mail delivery affected other aspects of the Hospital's business. [Rosler Depo. II at 152]. For example, the Business Office's needed the mail by a certain hour in order to make timely bank deposits which would then be eligible for daily interest. [Rosler Depo. II at 152-154]. Although Stone usually delivered the mail on time, she was often late enough that various departments complained that they were not getting their mail on time. [Freeman Depo. at 61, 65, 68-76; Rosler Depo. at 117-22 & EX 44 thereto].

Stone alleges that she was mistreated by McGaha during the latter periods of her employment. [K. Stone Aff. at ¶ 18-19]. Huntsville Hospital denies this assertion and both parties proffer deposition testimony to support their contentions. Stone admits that she is more sensitive than the average person but she claims that the harsh treatment adversely affected her job performance.[3] [Pl. Br. at 11].

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[3] The Court has taken notice of the several pieces of correspondence between Stone and McGaha and other Huntsville Hospital personnel which have been incorporated into the Plaintiff's briefs. For the sake of brevity, such correspondence will be referred to as needed in

(Continued on following page)

On the afternoon of March 30, 2000, McGaha called Stone into her office and counseled her regarding her job performance. [PX 63]. During this counseling, Stone became upset and after work she said to her mother: "[m]om, JoAnn just got me so upset I felt like choking her neck" or similar words to the same effect. [R. Stone Depo. at 140-41; DX 61]. Stone's mother helped her prepare a letter to McGaha which discussed the manner in which McGaha had addressed Stone the previous day. [PX 62]. McGaha received the letter the next morning, then drove Stone to the Post Office to get the mail. [McGaha Depo. at 28, 33, 113]. That morning Stone did her inside mail rounds without incident. [McGaha Depo. at 21, 27]. During her lunch break, Stone told a co-worker, Amy Ashby (hereinafter "Ashby"), that she had been so angry with McGaha the previous afternoon that she felt like she was going to choke McGaha's neck; she then made a choking gesture with her hands. [Ashby Depo. at 25-26]. Based on the conversation with Stone, Ashby believed that JoAnn McGaha was in danger of imminent harm. [Ashby Depo. at 25-26]. Because of her concerns, Ashby approached McGaha and told her about the conversation she had with Stone during lunch. [Ashby Depo. at 24-31]. McGaha then reported this information to the Human Resources Department and her manager, Jan Henderson. [McGaha Depo. at 141-53]. Human Resources instructed McGaha to have Ashby document her conversation with Stone.[4]

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the "analysis" portion of this opinion and will not be specifically addressed in the "facts" portion.

[4] The Court has taken notice of the conflicting evidence presented by the parties regarding the statement Ashby provided to the Human Resources Department. The Court cannot make findings of credibility at the summary judgement stage, however, the Court has determined

(Continued on following page)

[Rosler Depo. II at 292-93]. McGaha then reported to the office of Andrea Rosler, Vice President of Human Resources. [Rosler Depo. at 211-12]. Rosler explained that she wanted to meet with Ashby personally and hear exactly what Stone said; McGaha was given permission to go home early. [Rosler Aff. 1154; Rosler Depo. at 295-96].

After meeting with Ashby, Jan Henderson and Andrea Rosler met with Stone and, during their meeting, Stone admitted to making the alleged statement. [Rosler Aff. ¶ 61; K. Stone Depo. at 248-49 & Ex. 59 thereto; Henderson Depo. at 134]. The meeting concluded when Andrea Rosier made the decision to terminate Stone's employment with Huntsville Hospital. [Rosler Aff. ¶ 52, 66]. Shortly after her termination, Stone wrote a description of her termination meeting and in her own handwriting stated: "Andrea Rosler asked me if I said that I felt like choking Joan McGaha's neck and me being honest I said yes . . . " [K. Stone Depo. at 251-52 & Ex. 59 thereto].

Huntsville Hospital has a zero-tolerance policy regarding workplace threats; this policy states that you are not allowed to threaten another hospital employee regardless of your true intentions. [Rosler Depo. at 182-90, 216].

Two days before Stone's termination, another hospital employee was terminated for making a threat after a confrontation with another hospital employee. [Rosler Aff. ¶¶ 67-68; Rosler Depo. at 240-41]. This particular employee

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that the conflicting statements given by Ashby are not needed to determine summary judgement in this case. Consequently, the opinion of this Court has not been founded on Ashby's statement to Human Resources.

claimed that he was not "serious," however, Rosler terminated his employment. [Rosler Aff. ¶¶ 67-68; Rosler Depo. at 240-41].

ANALYSIS

Stone presents three claims for this Court address, Stone contends: (1) she suffered a discriminatory discharge because of her disabilities; (2) she was retaliated against because of her requests for accommodation and; (3) Huntsville Hospital failed to accommodate her disabilities as required under the ADA. [Complaint ¶¶ 12, 14]. Each of the aforementioned claims will be addressed individually.

I. Discriminatory Discharge

The ADA provides that an employer may not discriminate against an individual with a disability because of that disability with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). In order to prevail on an ADA claim, a plaintiff must first establish that "(1) she has a disability; (2) she is a qualified individual; and (3) she was unlawfully subjected to discrimination because of this disability." *LaChance v. Duffy's Draft House, Inc.,* 146 F.3d 832, 835 (11th Cir. 1998). Discrimination claims under the Rehabilitation Act of 1973 are governed by the same proof standards used in ADA cases. *Holbrook v. City of Alpharetta, Georgia,* 112 F.3d 1522, 1526 n.2 (11th Cir. 1997). Thus, "cases decided under the Rehabilitation Act are precedent for cases under

the ADA, and vice versa." *Cash v. Smith,* 231 F.3d 1301, 1305 n.2 (11th Cir. 2000).

For the purposes of this motion only, Huntsville Hospital does not dispute that Stone is disabled within the meaning of the ADA. [Def. Br. at 41]. Therefore, Stone only bears the burden of proving that (1) she is a qualified individual and; (2) she was unlawfully subjected to discrimination.

Huntsville Hospital contends that Stone is not a qualified individual within the meaning of the ADA because she presented a direct threat to the Hospital staff, specifically McGaha. [Pl. Br. at 42]. The ADA permits an employer to discharge a disabled employee if the employee is a "direct threat" to the health and safety of other individuals in the workplace. *See* 42 U.S.C. § 12113(a), (b); *Moses v. American Nonwovens, Inc.,* 97 F.3d 446, 447 (11th Cir. 1996). The ADA defines direct threat as "a significant risk to the health or safety of others that cannot be eliminated by a reasonable accommodation." 42 U.S.C. § 12111(3). The Eleventh Circuit has held that the plaintiff in an ADA case has the burden of proving that she was not a "direct threat." *See LaChance,* 146 F.3d at 836. Accordingly, Stone has the burden of proving that she was not a direct threat to herself, or McGaha.

Huntsville Hospital contends that Stone's statement that she wanted to choke McGaha constituted a direct threat and therefore justified her termination in light of her disability. Stone contends that her threats were not serious and were merely a figure of speech and that it was Huntsville Hospital's failure to accommodate her disability which caused her outburst. Stone also alleges that Huntsville Hospital did not perform a reasonable investigation

into her actions before making the decision to terminate her employment.

In the instant case, it is Stone's own handwritten account of the events as they occurred on the date of her termination which casts the most doubt on her contentions regarding her "seriousness." Stone stated in her own handwritten testimony, on two separate occasions that: (1) "I said to my Mom that I was going to choke her neck" and; (2) "I talked to Amy as I usually do and I said that I had felt like chocking [sic] JoAnn's neck . . . Andrea Rosler asked me if I said that I felt like choking JoAnn McGaha's neck and me being honest I said yes . . . she made me mad" [DX 59 to K.Stone Depo.]. Stone's assertion that she was not "serious" does nothing to rebut the fact that she may have been perceived as a direct threat on the day in question. The implementing regulations require that:

> "[t]he determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence." 29 C.F.R. § 1630.2(r).

The key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action. *See Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998).

In the instant case, it is clear that Huntsville Hospital relied on "the best available objective evidence" when it made the decision to terminate Stone. Stone made a threat, another co-worker reported the threat, HR spoke

with Stone, and she was terminated. The ADA does not require an employer to retain a potentially violent employee because such a requirement would place the employer in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if the employee were retained and later harmed someone. *Palmer v. Circuit Court of Cook County Illinois,* 117 F.3d 351 (7th Cir. 1997). Additionally, Huntsville Hospital presented evidence that it had recently terminated an African-American employee earlier in the week for making similar threats in the workplace. Under the same theory presented in *Palmer,* the retention of Stone after a blatant violation of Huntsville Hospital's policy may have subjected the Hospital to liability under Title VII from the employee who was terminated for his violation of the same policy.

Stone's own undisputed testimony affirms the fact that Huntsville Hospital could, in good faith, perceive Stone as a direct threat to McGaha. Stone's assertion that these words were merely a "figure of speech" are without merit and no precedent is cited to support Stone's contentions that the "seriousness" of a threat should be determined by the advocate of such statements. The Court has therefore determined that Stone could, in good faith, be perceived as a direct threat to McGaha. Because Stone posed a direct threat to McGaha, she is not considered a "qualified" individual under the ADA and therefore cannot establish a prima facie case of discrimination. Accordingly, Huntsville Hospital is entitled to summary judgment as to this claim.

II. Retaliation

To establish a prima facie case of retaliation under the ADA, Stone must show (1) that she engaged in a protected expression or activity; (2) she suffered an adverse employment action; (3) the adverse action was causally related to the protected expression or activity. *See Wideman v. Wal-Mart Stores, Inc.,* 141 F.3d 1453, 1455 (11th Cir. 1998); *Meeks v. Computer Associates International,* 15 F.3d 1013, 1021 (11th Cir. 1994); *Goldsmith v. City of Atmore,* 996 F.2d 1155, 1163 (11th Cir. 1993).

To satisfy the first element, Stone contends that letter she gave McGaha on the morning of her termination was the "protected activity" which served as the basis for retaliation. [Pl. Br. at 76]. The letter informs McGaha that Stone was not pleased with the previous day's counseling session regarding her job performance. [PX 62]. At the end of the letter, Stone states "[p]lease consider my request for better treatment." [PX 62]. Because this request for "better treatment" could be considered as a request for accomodation, the Court has determined that Stone has satisfied the first element of the prima facie case. *See Standard v. A.B.E.L. Services Inc.,* 161 F.3d 1318, 1328 (11th Cir. 1998). Additionally, because Stone suffered the adverse employment action of termination, the second element of her prima facie case has also been met. *See Gupta v. Fla. Bd. of Regents,* 212 F.3d 571, 587 (11th Cir. 2000). However, Stone still has the burden of proving that her termination was causally related to the submission of her letter. To meet this burden, a plaintiff is only required to show that the protected activity and the adverse action were not "wholly unrelated." *Goldsmith,* 996 F.2d at 1163. In order to show the two things were not entirely unrelated, a plaintiff must generally show that the decision maker was

aware of the protected conduct at the time of the adverse employment action. *Brungart v. Bellsouth Telecommunications, Inc.,* 231 F.3d 791, 799 (11th Cir. 2000). To establish causation, Stone relies primarily upon the short amount of time which elapsed between the delivery of her letter and her termination. [Pl. Br. at 76]. The Court has determined that this time period *alone,* while evidence of causation, is insufficient to prove causation, by itself. The law in this Circuit requires the *decision maker's* awareness of the protected conduct at the time of the adverse employment action. *See Brungart,* 231 F.3d 799. Stone has not presented evidence demonstrating that Andrea Rolser (the "decision maker" involved in Stone's termination) was aware of her letter on the date of her termination. However even if Stone could somehow satisfy the third element of the prima facie case, her claim would still fail because she cannot establish that Huntsville Hospital's legitimate non-discriminatory reason for her termination was a pretext for discrimination. Stone is disabled and she was terminated, but she has not shown that she was terminated because of a protected activity. The uncontroverted evidence is that that Stone was terminated for threatening a co-worker. Because Stone cannot establish a prima facie case of retaliation, Huntsville Hospital is entitled to summary judgement as to this claim.

III. Failure to Accommodate

Under the ADA it is unlawful for a covered entity not to make a reasonable accomodation of an otherwise qualified applicant or employee unless the covered entity can demonstrate that the imposition of the reasonable accomodation would impose an undue hardship on the operation of the business. 29 U.S.C. § 1630.9. The plaintiff bears

the burden of production of identifying an accomodation that would allow her to perform the job's essential functions, and the burden of persuasion with respect to demonstrating that such accomodation is reasonable. *See Lucas v. W.W. Grainger,* 257 F.3d 1249, 1255-56 (11th Cir. 2001). The duty to provide a reasonable accomodation is not triggered unless the employee makes a specific request for accomodation. *Gatson v. Bellingrath Gardens & Home, Inc.,* 167 F.3d 1361, 1363 (11th Cir. 1999). A plaintiff is not entitled to her preferred accomodation, only one that is reasonable. *Stewart v. Happy Herman's Cheshire Bridge, Inc.,* 117 F.3d 1278, 1285-86 (11th Cir. 1997). The law requires an employer to engage in good faith in an "interactive process" of accommodating a plaintiff, after the employer is informed of the need for accommodation. *Stewart,* 117 F.3d at 1286-87.

The first dispute between the parties regards whether Stone's duties as a mail courier are considered "essential functions." Stone contends that the functions are not essential and therefore could have been eliminated. However, employers are only required to provide accommodation when such accommodation would allow a disabled person to perform essential functions of his or her job. *See Lucas*, 275 F.3d at 1255-56. If the Court determines that the courier duties were essential functions, then Stone will not have a basis for a failure to accommodate claim. However, Stone contends that because her courier functions were not essential, they could have been eliminated from her list of job responsibilities, which would have relieved her stress and prevented her comments which resulted in her termination. [Pl. Br. at 35-38]. The Court must therefore determine whether Stone's functions as a courier were indeed essential.

Huntsville Hospital has presented evidence supporting the fact that Stone was assigned to courier duties with increasing frequency because her filing duties were decreasing as the hospital began keeping electronic records. [Newby Depo. at 35-36]. Stone herself testified that she understood her duties as a courier were becoming essential functions. For example, Stone states "it seems to be like mail was all of the sudden becoming more of one of my essential functions." [Stone Depo. at 127-29]. She was also told on January 10, 2000: "you are rated on mail room duties because they are an essential part of your job." [DX 55]. The courier duties also were not something new for Stone as she had often worked as a relief courier during her tenure at Huntsville Hospital. [McGaha Aff. ¶ 6; PX 37]. To support her contention that her courier duties were not an essential function, Stone cites work schedules which list her courier duties as a "secondary" function. However, Stone has not presented any authority which would support a finding that the term "secondary" is analogous to the term "non-essential." The Court has therefore determined that Stone's duties as a mail courier were indeed an essential function and will proceed under this conclusion.

Stone next contends that Huntsville Hospital never engaged in an "interactive process" to determine appropriate accommodations for her disability. [Pl. Br. at 71]. Huntsville Hospital contends that the accommodations provided to Stone were reasonable in light of her disabilities and that it did engage in an interactive process with Stone to determine those accommodations. [Def. Br. at 34-35]. Therefore, the proper analysis for this claim is: (1) whether Huntsville Hospital engaged in the interactive process; (2) whether the current accommodations provided

to Stone were reasonable; and (3) whether Huntsville Hospital was required to accommodate Stone so as to provide a stress free work environment.

Stone's contention that Huntsville Hospital did not engage in an interactive process of accomodation is unfounded. The briefs submitted by the parties include correspondence from Stone discussing accommodations with her employer. For example, Rosler's last written communication with Stone stated: "I want to meet with you as soon as possible to discuss whether there are accommodations within the policy that can be made to better meet any special needs you may have . . . we will consider any information you provide or information you request." This is evidence that Huntsville Hospital was indeed engaged in an interactive accommodation process with Stone.

In response to Stone's correspondence, Huntsville Hospital provided the following accommodations: (1) preparation of a written list of mail stops to carry while doing the rounds; this accommodation would alleviate the "confusion" Stone experienced with doing the mail rounds; (2) Patient Accounting keeping juice, snacks, and a glucose tester for Stone to monitor her diabetes while at work; and (3) other employees driving Stone to the Post Office when it was her responsibility to pick up the mail. [McGaha Aff. ¶ 6; Henderson Depo. at 51-54; McGaha Depo. II at 27-32]. The Court has determined that these accommodations are reasonable and undeniably allowed Stone to perform the essential functions of her job as evidenced by her continued employment.

The issue then becomes whether Huntsville Hospital should have accommodated Stone by alleviating the

criticism and work related stress which allegedly led her to make the comments which resulted in her termination. Huntsville Hospital is not under an obligation to provide a stress free work environment to employees under the ADA. "An employee's ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position. Absence of such skills prevents the employee from be 'otherwise qualified." *Williams v. Motorola, Inc.,* 303 F.3d 1284, 1290-91 (11th Cir. 2002). Stone does not dispute that her repeated reprimands and counseling from McGaha were a result of her inability to successfully complete the mail rounds. [Pl. Br. at 9]. Additionally, Stone has admitted that she is more sensitive than the average person. [Pl. Br. at 11]. This increased sensitivity may have caused Stone's job to be more stressful, but Huntsville Hospital is under no obligation to accommodate "stressed employees," only those who are disabled. After reviewing the evidence presented by the parties, it appears that Stone is unable to complete the essential functions of her mail courier job even with the written schedule accommodation and the transportation accommodation. Her inability to do this renders her not "otherwise qualified." The Court has also determined that Huntsville Hospital was not under an obligation to provide the accomodation of a "stress free" work environment.

Huntsville Hospital has also presented additional evidence of Stone's Social Security disability benefits application which states, under oath, that she was "totally and permanently disabled" on March 31, 2000, the same date of her termination. The Supreme Court has held that:

> "a plaintiff's sworn assertion in an application for disability benefits that she is, for example,

> "unable to work" will appear to negate an essential element of her ADA case – at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation. *Cleveland v. Policy Management Systems,* 526 U.S. 795, 806 (1999).

The only evidence in the record which may be somehow construed as an "explanation" of the testimony in this application is one or two references to Stone's deteriorating health after her termination. [Pl. Br. at 54]. However, this evidence is not directed specifically at rebutting the evidence in the SSDI application. Stone's application specifically states: "her difficulties got worse" prior to her termination and "they prevented her from carrying out her new duties as courier at Huntsville Hospital in a satisfactory manner." [DX 8].

After reviewing the evidence presented by the parties, the Court has determined that Stone's inability to perform the essential functions of "courier/file clerk" keep her from being otherwise qualified, that is, able to perform the essential functions of her job with or without reasonable accomodation. Additionally, Stone has not identified any *reasonable* accommodation which would allow her to perform the essential functions of the courier position. Because Stone is not otherwise qualified, she is unable to satisfy the second element of her prima facie case and therefore her claim should fail. Accordingly, Huntsville Hospital is entitled to summary judgment as to this claim.

CONCLUSION

For the reasons set forth above, the Court grants Defendant Huntsville Hospital's motion for summary judgement as to Plaintiff Stone's discrimination, retaliation, and failure to accommodate claims.

DONE and **ORDERED** this 28th day of March, 2006.

/s/ Virginia Emerson Hopkins
VIRGINIA EMERSON HOPKINS
United States District Judge